IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

TUESDAY, THE 20TH FEBRUARY 2007 / 1ST PHALGUNA 1928

Crl.MC.No. 431 of 2007()

CC.70/1998 of JUDL. MAGISTRATE OF FIRST CLASS-II, PERAMBRA

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PETITIONER/ACCUSED:

IMBICHI ALI,
S/O.AMMED HAJI,
NADAKKAL HOUSE,
ARIKKULAM AMSOM,
VAKAMOLI DESOM,
KOYILANDY TALUK.

BY ADV. SRI.P.V.KUNHIKRISHNAN

RESPONDENTS/COMPLAINANT & STATE:

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1. SUB INSPECTOR OF POLICE,
PERAMBRA.

2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.S.U.NAZER

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 20/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R.BASANT, J

Crl.M.C.No.431 of 2007

Dated this the 20th day of February 2007

O R D E R

The petitioner is the defacto complainant in a prosecution interalia under Sections 457 and 380 I.P.C. Altogether there were seven accused persons. Accused 1 to 4 entered appearance and faced trial. Accused 5 to 7 are absconding. Before the trial was completed, accused 2 and 4 started absconding. It is submitted that all evidence of the prosecution has been recorded even before accused 2 and 4 started absconding. Accused 1 and 3 are found guilty and convicted. They have undergone the sentence also by now, it is submitted. In as much as the trial against Accused 2 and 4 to 7 has not been completed, the learned Magistrate did not direct release of the valuable material objects, subject matter of the theft. The petitioner came to this court and by Annexure B order, the learned Magistrate was directed to consider the dictum in Sunderbhai Ambalal Desai v. State of Gujarat (SC) [2003(2) KLT 1089] and pass appropriate orders whether the release be under Section 451 or under Section 452 Cr.P.C. It is, thereafter, that

the learned Magistrate passed the impugned order. The petitioner is aggrieved by the condition imposed in paragraph 3 (2)(c) in Annexure D order. That condition obliges the petitioner to file affidavit of undertaking not to transfer the same and express the willingness to produce the same before court as and when directed without fail.

2. The petitioner submits that there is no other claimant for the property at all. The absconding accused 2 and 4 who had taken part in the proceedings till the prosecution evidence was closed, did not raise even the semblance of a contention that the properties in question belong to them. Thus, they have no claims over the property, going by the stand taken by them in the course of cross-examination of the prosecution witnesses. It would be harsh, unkind and unnecessary to insist that the petitioner, victim of the offence of theft, must keep the property in the same condition indefinitely awaiting apprehension of the absconding accused. This is an ideally fit case where the dictum in Sunderbhai Ambalal Desai v. State of Gujarat (SC) [2003(2) KLT 1089] must have been applied reasonably and the valuable items of property should have been released to the petitioner

without a condition, clause (c) referred above, which reads as follows:

> (c) "File affidavit of undertaking not to transfer the same and express the willingness to produce the same before court as and when directed without fail."

3. I find force in this submission. If really the absconding accused 2 and 4 from whose possession recovery has been effected under Section 27 have not staked any claim for the relevant items of property, I find no reason why the learned Magistrate should not release the properties in question to the petitioner, after ensuring that sufficient safeguards are made for identifying those items of property. This can be done by insisting on photographs, preparation of detailed panchanama or taking of video photos etc of the articles in question. The petitioner can be directed to execute a bond with sureties to pay the value of the property, if ultimately after further trial, those items of properties were found to be liable to be returned to any other person.

4. I am satisfied that the learned Magistrate must be directed to consider the matter afresh to decide whether it is

necessary to insist on condition (c) referred above. I am not issuing any directions finally in the matter as I want the records to be verified to ascertain whether the absconding accused 2 and 4 had taken part in the proceedings till the evidence was closed and whether they have staked any claim for return of the properties in question.

5. In the result, the condition imposed in paragraph 3(2) (c) of Annexure D order is set aside and the learned Magistrate is directed to consider the matter afresh and decide whether the property can be released to the petitioner without insisting on such conditions by making appropriate alternative safeguards.

6. I expect the learned Magistrate to pass final orders within a period of ten days of the production of this order by the learned counsel for the petitioner before the learned Magistrate.

Issue copy of this order straight away to the counsel.

(R.BASANT, JUDGE)

jsr

R.BASANT, J

C.R.R.P.No.

ORDER

21ST DAY OF JULY 2006